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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KELVIN D. DANIEL, et al.,

Plaintiffs,

v.

SWIFT TRANSPORTATION
CORPORATION,

Defendant.

Case No. 2:11-cv-01548-PHX-ROS

**DEFENDANT SWIFT
TRANSPORTATION CO. OF
ARIZONA, LLC'S STATEMENT
OF MATERIAL FACTS IN SUPPORT
OF ITS MOTION FOR SUMMARY
JUDGMENT**

Assigned to: Hon. Roslyn O. Silver

Pursuant to Fed. R. Civ. P. 56 and LR Civ. 56.1(a), Swift Transportation Co. of Arizona, LLC ("Swift"), files its separate Statement of Material Facts in Support of its Motion for Summary Judgment, as follows:

MATERIAL FACTS

1. Kelvin Daniel submitted an online application for a commercial truck driver position with Swift, a position regulated by the U.S. Department of Transportation, on December 27, 2010. *See* Declaration of Michelle Cordova, attached hereto as Exhibit ("Exh.") A, at ¶ 2; Deposition Transcript of Kelvin Daniel, cited portions attached hereto as Exh. B, at 118:10 – 119:19; Doc. 19 at ¶ 9. *See also* Swift's First Amended and Supplemental Responses to Plaintiffs' First Set of Interrogatories, served on July 19,

2012, a true and correct copy of which are attached hereto as Exh. E, Responses to Interrogatory Nos. 3, 5, 10.

2. Swift ordered a consumer report on Daniel, including a criminal background report, on December 28, 2010, the day after he applied. *See* Exh. A at ¶ 3; Exh. B at 132:7 – 134:11. The report contained no criminal background information, *e.g.*, it was “clean.” Exh. A at ¶ 3; Exh. B at 134:24 – 135:14; Exh. E, Response to Interrogatory No. 10.

3. Swift had no in-person contact with Daniel until January 24, 2011, when Daniel attended an orientation. Exh. B at 133:24-134:11; 135:24 – 136:5; 138:15 – 139:14; 142:19 – 143:6; Exh. E, Response to Interrogatory No. 9.

4. Tanna Hodges applied in-person with Swift on September 25, 2009 by leaving a copy of her application with a company location in San Antonio. Deposition Transcript of Tanna Hodges, cited portions attached hereto as Exh. C, at 130:13 – 132:9 (including Depo. Exh. 24); Exh. E., Response to Interrogatory No. 10.

5. Hodges applied again in-person with Swift on September 29, 2009, by leaving a copy of her application at Swift’s Columbus, Ohio terminal. Exh. C at 159:19 – 160:25 (including Depo. Exh. 1); Exh. E., Response to Interrogatory No. 10.

6. Swift did not order a consumer report with respect to Hodges’ September 25, 2009 or September 29, 2009 applications. Exh. A at ¶ 4; Exh. C at 151:18 – 152:3; 173:6-9; 178:5-11; Exh. E., Response to Interrogatory No. 10.

7. Hodges’ December 12, 2009 employment application was a computer website application, submitted on-line, and there was no in-person interaction with Swift prior to submitting this application. Exh. C at 182:7 – 184:16 (including Depo. Exh. 23); Exh. E., Response to Interrogatory Nos. 9 and 10.

8. Swift ordered Hodges’ consumer report on December 14, 2009. Exh. A at ¶ 5. The report shows that it was ordered on December 14, 2009. *Id.* Swift produced this consumer report to Plaintiffs on January 9, 2012. *See* Swift’s Initial Disclosure Statement, a true and correct copy attached hereto as Exh. D; Doc. 34 (Notice of Service of Initial

1 Disclosure Statement); Exh. E., Response to Interrogatory No. 10.

2 9. For its Answer to Interrogatory No. 9, Swift again confirmed to Plaintiffs
3 that, “Ms. Hodges’ September 2009 applications, while received, were not processed
4 beyond the application stage and no consumer report was ever ordered by Swift with
5 respect to these applications.” Exh. E, Response to Interrogatory 9; Doc. 72.

6 10. On Daniel’s December 27, 2010 online application, Exh. 1, in response to
7 the question, “Have you ever been convicted of a criminal offense?”, Daniel responded,
8 “No.” Exh. A at ¶ 6; Exh. B at 130:20 – 131:1; 135:20-23.

9 11. On January 24, 2011, the first day that he attended Swift’s orientation, and
10 upon being told that orientation attendees need to be honest about their prior criminal
11 history, Daniel voluntarily disclosed to Chad Baumgarner, a Swift employee, that he had
12 three criminal convictions for public intoxication, battery and reckless conduct. Exh. B at
13 139:1 – 141:15; Exh. E, Response to Interrogatory Nos. 9 and 10.

14 12. On January 27, 2011, Swift’s Investigation Department interviewed Daniel.
15 That interview confirmed Daniel’s criminal conviction information voluntarily disclosed
16 at orientation, and further confirmed that he did not disclose that criminal conviction
17 information on his employment application. Swift decided not to hire Daniel because he
18 falsified his application. Exh. E, Response to Interrogatory Nos. 9 and 10.

19 13. Daniel admitted in his deposition that, because the criminal background
20 report was clean and because he had not disclosed his criminal convictions on his
21 application, there was no way for Swift to know about his criminal history prior to him
22 voluntarily disclosing it at orientation. Exh. B at 135:8 – 136:3; 147:4-7.

23 14. In the First Amended Complaint, Plaintiffs named Robert R. Bell, Jr. as the
24 sole plaintiff for Counts III and IV. Doc. 19 at ¶¶ 36, 56 – 65.

25 15. In a call on May 11, 2012, counsel for Plaintiffs proposed dismissing Bell,
26 the lone class representative for Counts III and IV, from the lawsuit. Swift agreed to the
27 requested dismissal and, on May 21, Plaintiffs filed a Stipulated Notice of Dismissal
28 Without Prejudice with the Court that Plaintiffs’ counsel drafted. Doc. 57.

1 16. On May 24, this Court entered the Order dismissing Bell's claims, Counts
2 III and IV, without prejudice. Doc. 58.

3 17. At the Court's January 10, 2012 Rule 16 conference, Plaintiffs suggested
4 there was "confusion" over the proper defendant and represented to the Court, "[w]e will
5 probably be cleaning that up, hopefully, within the next 30 days and either substituting the
6 proper party or having some notification to the Court." *See* Transcript of January 10,
7 2012 Proceedings, a true and correct copy of which is attached hereto as Exh. F, 23:25 –
8 24:5).

9 18. Swift Transportation Corporation is no longer the name of a company.
10 Swift Transportation Co. of Arizona, LLC is the name of the entity that would have
11 employed the named plaintiffs if they would have been qualified for hire and accepted job
12 offers from Swift. *See* Exh. E, Response to Interrogatory No. 2.

13 DATED this 5th day of October, 2012.

14 SNELL & WILMER L.L.P.

15
16 By: s/ John F. Lomax, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, a copy of the foregoing was served via U.S. Mail, Postage Pre-Paid on the following counsel of record.:

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